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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-1812

HAROLD WILLIS and CHRISTINE MATTHEWS,
Petitioners,

vs.

THE STATE OF CALIFORNIA, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of January 16, 1974, of the Court of Appeal of the State of California, First Appellate District, Division Two, is unreported. The substance of this opinion is reproduced under subdivision (i) of the petition for writ of certiorari on file herein, pages 25-27. Petitioners' application for hearing in the California Supreme Court was denied on March 13, 1974. A copy of the clerk's notice reflecting this denial is attached hereto and served and filed herewith as Exhibit A.

JURISDICTION

Petitioners invoke the jurisdiction of this Court to review the judgments below by writ of certiorari under Title 28, United States Code section 1257(3).

QUESTIONS PRESENTED

1. Whether the police conduct in gaining entry into the premises in question involved some form of active deception.

2. Whether such police conduct invalidated Miss Matthews' consent to enter by proximately causing her to compromise any exhibited reasonable expectation of privacy in those premises.

STATEMENT OF THE CASE

On August 25, 1971, an information was filed in the San Francisco Superior Court, charging Harold Willis and Christine F. Matthews, petitioners herein, with violation of California Health and Safety Code sections 11500.5 (now 11351) (possession for sale of a narcotic other than marijuana), 11911 (now 11378) (possession for sale of restricted dangerous drugs), and 11530.5 (now 11359) (possession of marijuana for sale) (Clerk's Transcript [hereinafter CT] 1). On September 3, 1971, each defendant pled not guilty to all counts of the information (CT 3).

On November 12, 1971, the defendants moved, pursuant to California Penal Code section 1538.5, that

all contraband seized in the case be suppressed as evidence (CT 4, 5, 7), on the ground that the search warrant (CT 20) was invalid as "based on a prior illegal search made by a deceptive and illegal entry into defendants' abode" (CT 9). This motion was denied on January 7, 1972 (CT 57; Augmentation to Reporter's Transcript [hereinafter RTA] 1-3): the court found that a deception was practiced by Officer Wolfe—he having no reason to believe that "Mike" was inside the premises at the time of his initial entry on July 1, 1971—but determined that such a deception may be used (RTA 2-3).

The case came on for jury trial on August 8, 1972, at which time the defendants withdrew their pleas of not guilty, and pled guilty to violation of California Health and Safety Code section 11530.5 (now 11359) (possession of marijuana for sale). The other two charges were thereupon dismissed on motion of the district attorney (CT 59).

On September 5, 1972, Mr. Willis was sentenced to State prison for the term provided by law (2-10 years) and admitted to bail pending appeal (CT 60). On the same date, Miss Matthews was sentenced to State prison for the term provided by law (2-10 years), execution thereof was suspended, and she was placed on probation for three years, subject to the condition that she serve six months in the county jail (CT 61).

Petitioners filed notice of appeal on September 5, 1972 (CT 65), and on January 16, 1974, their judgments were affirmed on appeal (*see* pages 25-27 of

the petition on file herein). On March 13, 1974, their petition for a hearing in the California Supreme Court was denied (*see* Exhibit A attached hereto), and their petition for a writ of certiorari was then filed in this Court on June 1, 1974.

STATEMENT OF FACTS

On Thursday, July 1, 1971, at approximately 10:00 p.m., San Francisco Police undercover Officers Fred Kennerley and Patrick Wolfe went to 558 Steiner Street, San Francisco (Preliminary Hearing Transcript [hereinafter PHT] 5, 11, 12). Officer Wolfe rang the bell (PHT 11), and Christine Matthews answered the door (PHT 6, 19). They explained that they were looking for a certain individual, "Mike" (PHT 6, 20).

Officer Wolfe had gone to that address with "Mike" on two previous occasions to be introduced to individuals within those premises to make purchases of narcotics, but was unsuccessful in this regard (Reporter's Transcript [hereinafter RT] 12-13). He was there on the night in question to further this narcotics investigation (RT 16), hoping "Mike" would be there (RT 13).

He told Miss Matthews that he was looking for a Mike Bardeleban (mentioning the last name: RT 17) and asked her if he was there, giving her a description of Mike (RT 14, 18). He then thought the de-

scription was accurate (RT 22, 27), but acknowledged on the stand that he was mistaken about Mike having a beard (RT 18, 23).

Miss Matthews said that from the description, she did not know the particular person they were talking about, and she could not say that that person was there. But she also said that there were several people upstairs playing poker (PHT 6, 12), and that the two officers could see if Mike was there (RT 14, 18).

The conversation between Miss Matthews and Officer Wolfe was, according to Officer Kennerley, something to the following effect:

> Officer Wolfe: "Hey, what's happening? Is Mike upstairs?"
>
> Miss Matthews: "Mike who?"
>
> Officer Wolfe: "You know, Mike, he is the tall guy with the beard and long hair."
>
> Miss Matthews: "Gee, I don't know if he is, there are a lot of people playing cards upstairs, come in and look." (PHT 20.)

Miss Matthews thereupon admitted the officers, saying "Come on in" or words to that effect (PHT 13). They all went upstairs to the back of the building to what appeared to be the kitchen, where some people were playing cards. A quantity of vegetable material was visible on the table, and a strong aroma of marijuana was discernible (PHT 6, 12). The officers also saw contraband through an open door at the other end of the hallway (PHT 8-9). They then told Miss Matthews that the person they were trying to locate was not on the premises, and left (PHT 10, 39).

They returned about two minutes later with three other officers: Sully, Yeargain, and Molinari (PHT 39-40). Officer Sully told Miss Matthews at the door that he was a police officer on a narcotics investigation and that they had been advised that there was marijuana and LSD on the premises. He asked if she minded if they went upstairs, she did not say anything in response, and they all went upstairs (PHT 42, 52-53). All the people in the kitchen were placed under arrest, advised of their rights, and told that Officer Sully was going to attempt to obtain a search warrant (PHT 43, 58). He did so later that evening, served it on Miss Matthews, and then conducted a search of the premises (PHT 44; RT 74-75). This search resulted in seizure of the contraband which was the subject of the motion to suppress in the Superior Court (PHT 81-85).

On November 12, 1971, at the hearing of the defense motion to suppress evidence, the district attorney conceded that if the original entry into the premises was unlawful, the search warrant and search and seizure pursuant thereto were also invalid (RT 3:16-4:11, 7:17-20).

SUMMARY OF ARGUMENT

I. The police conduct in gaining entry into the premises in question did not involve any form of active deception.

II. Such police conduct did not invalidate Miss Matthews' consent to enter because it did not proxi-

mately cause her to compromise any exhibited reasonable expectation of privacy in those premises.

ARGUMENT

I

THE POLICE CONDUCT IN GAINING ENTRY INTO THE PREMISES IN QUESTION DID NOT INVOLVE ANY FORM OF ACTIVE DECEPTION.

Petitioners cite six California cases for the proposition that consent to enter and the use of any evidence obtained thereby are invalid under the Fourth Amendment, where the consent was obtained by deception.[1] However, those cases are completely distinguishable.

In *People v. Reeves,* 61 Cal.2d 268, 38 Cal.Rptr. 1 (1964), the hotel manager's call to the defendant made the defendant believe something that was not true: that there was a letter for him at the desk. In *People v. Mesaris,* 14 Cal.App.3d 71, 91 Cal.Rptr. 837 (1970), the plainclothesmen's asking for the refrigerator repairman under the circumstances misled the defendant into believing that they were there for a business purpose: either to aid or talk to the repairman as co-repairmen. In the case of *In re Robert T.,* 8 Cal.App. 3d 990, 88 Cal.Rptr. 37 (1970), the apartment owner's

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[1]Federal cases are to the same effect: *Gouled v. United States,* 255 U.S. 298, 305-306, 41 S.Ct. 261, 65 L.Ed. 647 (1921); *Fraternal Order of Eagles, No. 778 v. United States,* 57 F.2d 93 (3rd Cir. 1932); *United States v. Reckis,* 119 F.Supp. 687 (D. Mass. 1954); *United States v. Guerrina,* 112 F.Supp. 126 (E.D. Pa. 1953); *United States v. Mitchneck,* 2 F.Supp. 225 (M.D. Pa. 1933).

introduction of the policeman as a friend misled the defendant into believing that they were merely checking the condition of the apartment.

In *People v. Miller,* 248 Cal.App.2d 731, 56 Cal. Rptr. 865 (1967), the apartment manager's statement misled the defendant into believing that he had a caller for whom he would have immediately opened the door. In *People v. Porter,* 227 Cal.App.2d 211, 38 Cal.Rptr. 621 (1964), the sergeant's affirmative answer to the defendant's question made the defendant believe something that was not true: that his roommate, Bill, was at the door. In *People v. Hodson,* 225 Cal.App.2d 554, 37 Cal.Rptr. 575 (1964), the policeman's statement through the door misled the defendant into believing that the speaker was the manager.

In sum, as the Court said in *Mann v. Superior Court,* 3 Cal.3d 1, 9, 88 Cal.Rptr. 380, 384, 472 P.2d 468, 472 (1970):

> "Cases holding invalid consent to entry obtained by ruse or trick all involve some positive act of misrepresentation on the part of the officers, such as claiming to be friends, delivery men, managers, or otherwise misrepresenting or concealing their identity. [Citations.] Here there was no such form of active deception."

If "to deceive" can fairly be defined as "to make a person believe what is not true" (*see* Webster's New World Dictionary, Concise Edition, 1962, page 196), it is clear that, contrary to the conclusion of the Superior Court (RTA 2-4, 6), a deception was not prac-

ticed in this case to gain the initial entry into the premises on July 1, 1971.

The court based its conclusion on its finding that Officer Wolfe had no reason to believe Mike was inside the premises at that time. But that does not necessarily mean a deception was practiced. The court asked, "Why isn't it a deception if you don't have reason to believe he is in there?" (RTA 4:21-22). The answer lies in the distinction pointed out by the district attorney (CT 30): while Officer Wolfe's asking for Mike may not have been based upon any belief that Mike was *in fact* there at that time, it was based upon his belief, from his observations of Mike going in and out of the premises on two previous occasions in April 1971 (RT 12-13, 19, 28), that Mike *might* be there.

Officer Wolfe was simply *hoping* Mike would be there, in all probability so as to again enlist his aid in another attempt to make a narcotics purchase from individuals within those premises. He merely asked *if* Mike was there. He did not say or imply that he personally knew Mike, that he thought Mike was there then, that he or Mike had ever been inside the premises, or that he or Mike knew anyone there. Most importantly, he did not ask to be admitted to look for Mike. Rather, Miss Matthews on her own initiative invited the two officers inside to look for Mike themselves.

Miss Matthews *may* have believed Officer Wolfe had reason to think Mike was in the premises (a point on which no evidence was introduced), but such

a belief could not reasonably be said to have been induced by Officer Wolfe; she would have simply jumped to the wrong conclusion. What Officer Wolfe can reasonably be said to have made Miss Matthews believe was that he was looking for Mike, hoping to find him there. There is no evidence or finding that her belief in this regard was erroneous.

The Superior Court's conclusion attempted to resolve an issue of law, *i.e.*, what constitutes a deception to gain entry, subject as such to ultimate determination by this reviewing court. In a proceeding to suppress evidence under California Penal Code section 1538.5, the trial court, in addition to its fact finding function, has a duty to decide whether, on the facts found, a challenged search was unreasonable within the meaning of the Constitution. The responsibility of a reviewing court in such a case is to measure the facts, as found by the trier, against the constitutional standard of reasonableness. *People v. Manning*, 33 Cal.App.3d 586, 589, 109 Cal.Rptr. 531, 540 (1973). The measurement depends, in part, on the general rule that a ruling of a trial court upon a motion implies a finding of fact favorable to the prevailing party on each ground or theory underlying the motion. *People v. Manning, supra* at 601-602, 109 Cal. Rptr. at 542.

Hence, while the Superior Court expressly found that Officer Wolfe had no reason to believe Mike was present on the premises at the time, it should also be treated by this Court as having impliedly found that Officer Wolfe reasonably caused Miss Matthews to

believe no more than what was true, that he was *hoping* Mike was there. When this latter fact is measured against the constitutional standard of reasonableness, the result becomes manifest: no deception as defined above was practiced to gain the entry in question.

The same can be said of the entry in *People v. Metzger*, 22 Cal.App.3d 338, 340-341, 99 Cal.Rptr. 264, 265 (1971). McDonald, the police agent therein, simply asked, after knocking at the door of the defendant's home, "What's doing, Mike," whereupon the defendant said, "Come on in." His false representation as a potential client of the defendant in no way related to the entry, having occurred the day before and resulting in an appointment at the defendant's office the following week. And he had previously been in the defendant's home on apparently purely social occasions. There was thus no indication that McDonald had, in the defendant's mind, arrived for the contemplated business call.

As here, the only "deception" in the *Metzger* case concerned the undercover agent's *motive, i.e.,* his purpose and government connections. *Id.* at 342, 343, 99 Cal.Rptr. at 266. Such artifice is permissible. *See United States v. White*, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971); *Hoffa v. United States*, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966); *Lewis v. United States*, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed. 2d 312 (1966); *On Lee v. United States*, 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed. 1270 (1951); *Sorrells v. United States*, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932);

People v. Metzger, supra at 341-344, 99 Cal.Rptr. at 265-267.

II

SUCH POLICE CONDUCT DID NOT INVALIDATE MISS MATTHEWS' CONSENT TO ENTER BECAUSE IT DID NOT PROXIMATELY CAUSE HER TO COMPROMISE ANY EXHIBITED REASONABLE EXPECTATION OF PRIVACY IN THOSE PREMISES.

As this Court held in *Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967),

> "[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."

In other words, the Fourth Amendment protects actual (subjective) expectations of privacy that society is prepared to recognize as reasonable. *Id.* at 361 (Mr. Justice Harlan, concurring). The test, then, in determining the constitutionality of a consensual entry by the police, is whether the person giving consent exhibited a reasonable expectation of privacy in the premises, and if so, whether that expectation was "violated by unreasonable government intrusion" because police deception proximately caused that person to compromise the expectation. *See North v. Superior Court,* 8 Cal.3d 301, 308, 104 Cal.Rptr. 833, 837, 502 P.2d 1305, 1309 (1972); *People v. Bradley,* 1 Cal.3d 80, 84, 85, 81 Cal.Rptr. 457, 459, 460 P.2d

129, 131 (1969); *People v. Edwards,* 71 Cal.2d 1096, 1103-1104, 80 Cal.Rptr. 633, 637-638, 458 P.2d 713, 717-718 (1969).

Given the lack of police deception as discussed in Argument I above, the entry here was not constitutionally invalid. Even assuming *arguendo* the Superior Court correctly concluded that a deception was practiced to gain entry into the premises, the entry was lawful. For Miss Matthews *exhibited* no expectation of privacy whatsoever when the two officers, strangers to her, asked if "Mike," yet another stranger to her, was there. On the contrary, by inviting them on her own initiative to come in and look for Mike themselves—instead of asking them to remain outside or at the bottom of the stairs while she went up to see herself if Mike was present—she was demonstrating that she was not at all concerned about privacy (CT 31-32). Indeed, the Superior Court specifically made such a determination (RTA 3:19-20).

Moreover, the two officers cannot be deemed to have reasonably induced, *i.e.,* proximately caused, Miss Matthews to permit their entry in violation of any supposed reliance by her on the privacy of the premises. Neither officer said or implied that he personally knew Mike, that he believed Mike was there then, that he or Mike had ever been inside the premises, or that he or Mike knew anyone there. And, most importantly, they did not ask to come in to look for Mike. Using no trickery to get the door open in the first place, they then simply asked as two total strangers if another stranger was there.

Miss Matthews merely misplaced her confidence in the officers not to disclose observations of narcotics which she knew they might very well make while inside (CT 31-32). The evidence was uncontradicted that narcotics were in plain view.[2] It is reasonably inferable, therefore, that she knew narcotics were present and could readily be observed by anyone permitted inside the premises. As the court indicated in *Hoffa v. United States, supra* at 301-302, the Fourth Amendment does not protect a wrongdoer who does not rely upon the security of the premises, but upon his misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. What one knowingly exposes to open view, even in his own home, is not a subject of Fourth Amendment protection. *Katz v. United States, supra* at 351.

Similarly, in *People v. Metzger, supra,* the defendant exhibited no expectation of privacy in his premises at the time of the informer's entry. He merely said, "Come on in" upon McDonald's query at the door, "What's doing, Mike." Rather, by subsequently producing and smoking the marijuana cigarette, Metzger was mistakenly trusting the informer not to disclose such wrongdoing.

Returning to the cases discussed in Argument I above, they are additionally distinguishable because they involved deceptive practices of the sort that

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[2]Objects in plain view of a police officer from a vantage point where he has a right to be are not discovered as products of a search. *See Ker v. California,* 374 U.S. 23, 43, 88 S.Ct. 1623, 10 L.Ed.2d 726 (plurality opinion) (1963); *Guidi v. Superior Court,* 10 Cal.3d 1, 6 n. 3, 109 Cal.Rptr. 684, 687, 513 P.2d 908, 911 (1973).

would and did reasonably induce persons, regardless of their innocence or guilt, to relinquish exhibited expectations of privacy in their respective premises.

In *People v. Reeves, supra,* trickery was used to get the defendant to open his door in the first place, not to thereafter enter the premises. The breach of privacy thus occurred upon the very opening of the previously closed door. The same can be said for the cases of *People v. Miller, People v. Porter,* and *People v. Hodson, supra.*

In *People v. Mesaris, supra,* the plainclothes policemen asked to see the refrigerator repairman. The implication was that they wanted to see him *inside* the premises, since he was working on the refrigerator. One of the defendants told them he was in the kitchen, and she pointed in its direction. She thereby demonstrated her expectation of privacy by allowing entry only into the kitchen, without any indication that she knew marijuana was hidden in the motor of the refrigerator.

In the case of *In re Robert T., supra,* the manager and policeman asked to be allowed to come in the apartment on the pretext of checking its physical condition. The defendant demonstrated his expectation of privacy by then pushing the door to a nearly closed position and saying, "Just a moment," admitting them only thereafter (8 Cal.App.3d at 993, 88 Cal. Rptr. at 38).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari in this case should be denied.

Dated, August 20, 1974.

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(Exhibit A Follows)

Exhibit A

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

Mar. 13, 1974

I have this day filed Order
HEARING DENIED

In re: 1 Crim. No. 11356

People
vs.
Willis, et al.

Respectfully,
G. E. Bishel
Clerk